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No. 08-174

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IN THE

Supreme Court of the United States

JUDY WANG,

Petitioner,

v.

PRUDENTIAL FINANCIAL CORPORATION AND PRUDENTIAL INSURANCE COMPANY OF AMERICA, D/B/A PRUDENTIAL INSURANCE COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner Judy Wang files this Reply Brief to briefly address Respondents' specious waiver arguments regarding Petitioner's Equal Pay Act and state law conversion claims.[1]

[1] Petitioner will not reassert her arguments regarding the initial pleading of those claims (Pet. For Cert. 6, 17-19) and the "fleshing out" of those claims in her response to Respondents' first Motion for Summary Judgment (Pet. For Cert. 8-9.) Similarly, Petitioner will not repeat her arguments and appellant brief quotations supporting non-waiver of these claims before the Court of Appeals for the Fifth Circuit. (Pet. For Cert. 10.) All

PETITIONER WANG HAS NOT WAIVED ANY OF HER CLAIMS BEFORE THIS HONORABLE COURT

I. Wang Asserted an Equal Pay Act Claim in the District Court

Following the erroneous granting of Respondents' first motion for summary judgment, the district court ordered the parties to file a joint statement clarifying Wang's remaining compensation-based claims. (C.R. 732.) After the parties filed separate statements, the trial court ordered Wang to file another statement summarizing her claims. (C.R. 970.) In their Opposition Brief, Respondents state, "Significantly, Wang [in this summary filing] did not assert that she was attempting to bring an EPA or state law conversion claim. (C.R. 986.)" (Opp. Brf. 7.) Nothing could be further from the truth!

On the same page cited by Respondents, Wang stated:

> 'The law against compensation discrimination includes all payments made to or on behalf of employees as remuneration for employment. All forms of compensation are covered . . .' (See Exhibit X).

(C.R. 986.) On Exhibit X, there is a *four (4) paragraph discussion of the Equal Pay Act*, which is also boldly captioned "Equal Pay Act." (C.R. 1019.)

Further, in her summary statement, Wang listed seven (7) specific compensation-based claims left unadjudicated by the district court's order on the first summary judgment motion. Item No. 4 expressly

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these facts and arguments were adequately presented in her Petition for Writ of Certiorari.

asserts an "unpaid earned commission" claim and states, in part, "This [insurance] policy was secretly reassigned to young male Richard Wang [(no relation to Petitioner)] to steal the commission via home computer with private email address [which] *violated EPA*." (C.R. 987 (emphasis supplied).) Wang goes on to state, "Wang did all the work and did not get paid." (Id.)

Clearly such statements point out Wang's purpose and intent to rely on the Equal Pay Act and also state facts asserting such a claim. Moreover, not only were Respondents served with this summary document (C.R. 988), but they actually attached it as an exhibit to their own second motion for summary judgment! (C.R. 1170.) Therefore, assertions in this Honorable Court that Wang never advised the district court that she was asserting claims under the Equal Pay Act are specious, at best.

II. Wang Even Supported Her Equal Pay Act Claim with Evidence

Not only did Wang assert an Equal Pay Act claim, but she filed admissible evidence regarding that claim as well.

In responding to the district court's order requesting a joint statement regarding her remaining claims (C.R. 732), Wang filed ten (10) "affidavits of fact" with documentary exhibits consisting of a total of 171 pages. (C.R. 754-925.) In Affidavit of Fact I, she described the commission due her and averred that she never received it and that it was, in fact, "transferred secretly to the young male new agent Richard Wang to boost his commission." (C.R. 766) She further averred that this transfer was "one of the proofs of Retaliation. My pay was reassigned to the

other young male agent. It is also the claim for Unequal pay due to Sex discrimination." (C.R. 767.) Finally, she again re-asserted in that affidavit what statute she was suing under:

> Defendant is covered by the EPA. The equal [sic] Pay Act, 29 U.S.C.A. §206(d) defines "Equal Work" as jobs, the performance of which requires equal skill, effort, responsibility and which are performed under similar working conditions. "Wages" is defined as all aspects of compensation as well as the value of "fringe benefits."

(C.R. 768.)

After stating her claims and supplying supporting evidence, Wang also responded to Respondents' second motion for summary judgment with arguments and evidence. (C.R. 1277-1371.) In this response, Wang again argued that "instead [of] paying plaintiff" she was fired and her commission was "secretly reassigned to the much younger Richard Wang." (C.R. 1284.) She repeated and enhanced this argument several pages later. (C.R. 1289.)

Further, not only did she make the arguments, but she also supported them with affidavit evidence. (C.R. 1299.) She averred that in Prudential's policy for reimbursing costs of taking qualification examinations like Series 7 and Series 65, "All the White males . . . were given the higher paying jobs . . . and gave more favorable treatment and were paid [for] Series 7 while they were studying as Financial Associates." (C.R.1309.)

Thus, it could not be clearer that the district court was indeed advised of Wang's Equal Pay Act claims. No waiver of these claims at the district court level occurred.

III. Wang Asserted State Law Conversion Claims in the District Court

Similarly, Wang apprised the district court of her state law conversion claims on numerous occasions. For instance, in addition to her Second Amended Complaint, on the first page of Wang's response to Respondents' second motion for summary judgment, she stated:

> These claims are to [sic] personal property of Plaintiff, which she owned or had earned and to which she had vested rights before these items of personal property were forcefully and wrongfully taken away from her on the date of her termination by Defendants.

(C.R.1281.) At the conclusion of this introduction, Wang further stated:

> Accordingly, the Court should deny Defendant's said Motion for Summary Judgment, and set this matter for hearing to determine the matters of personal property taken away from Plaintiff by Defendant, which should now be returned and/or restored, to Plaintiff (or compensate Plaintiff therefore with monetary and exemplary damages).

(C.R. 1285.) In fact, Wang even listed the components of her losses as one of the disputed facts:

> 1. The fact the Defendant took from Plaintiff her earned personal property, including:
>
> *a.* Earned commissions
>
> *b. Stock Options*
>
> *c. Personal items/family pictures*
>
> *d.* Compensations
>
> *e.* Fair treatment.

(C.R. 1291 (emphasis supplied.) Finally, in her argument section, Wang stated:

> Plaintiff has valid claims for wrongful taken [sic] by Defendant of Plaintiff [sic] valuable personal property including compensation for work previously completed or commissions earned and for her earned stock options and for her personal items.

(C.R. 1292.)

Just because Wang was *pro se* and failed to use the legal term "conversion" should not be held against her. She pled a wrongful taking of personal property, and she repeated her desire for the return of her "personal property," including stock options and "personal items" and "family pictures." There was no waiver of a state law conversion claim in the district court.[2]

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[2] Respondents attach some import to Wang's failure to include any mention of a state law conversion claim in her summary of remaining claims filing. (Opp. Brf. 7.) Again, such an argument is totally specious. The district court *ordered* Wang to only include compensation-based claims in this statement, not her personal property conversion claims. (C.R. 970-71.) Indeed, she was expressly precluded from mentioning non-compensation-based claims under the threat of "death-penalty" sanctions:

> Again, the statement should only pertain to any claims Wang may have to certain amounts or benefits that she earned or accrued during her employment with Prudential that have not been paid. Should Wang fail to comply with this order . . . the Court will dismiss her remaining claims with prejudice.

(C.R. 971.)

IV. Wang Advised the District Court That Some of Her Claims Were Still Not Addressed.

Likewise, Wang did not waive her complaint that her Equal Pay Act and state law conversion claims were not addressed in Respondents' motions for summary judgment. Wang pointed out to the district court in numerous places that Defendants' second motion for summary judgment did not address all of her remaining claims:

1. "There were several claims that Defendant did not address at all. Apparently they are true as a valid claims [sic] and Plaintiff is entitled to have this [sic] claims." (C.R.1290)

2. "There were several claims that Defendant did not address at all. Apparently they are true as a valid claims [sic] and Plaintiff is entitled to have this [sic] claims." (C.R.1291)

3. "There were several claims that Defendant did not address at all. Apparently they are true as a valid claims [sic] and Plaintiff is entitled to have this [sic] claims. Therefore it is only a Partial Summary Judgment." (C.R.1294)

Thus, the district court was made aware that not all of Wang's claims were addressed by Respondents' second summary judgment and that certain of her claims remained to be adjudicated. Therefore, the district court's error in this regard was not waived.

V. Waiver of the Finality of the Judgment by the District Court is Impossible

Respondents assert that Wang has argued that the district court's judgment is somehow not final. (Brf. Opp. 17-18.) Respondents misconstrue Wang's

arguments. Wang does not contend, nor has she ever contended, that the district court's judgment in this case is not final.[3] Wang contends it was erroneous for the district court to dismiss all her claims when they were not all addressed in Respondents' motions for summary judgment. However, if Respondents are correct, and the judgment is, indeed, not final, then Wang could not have waived anything because jurisdiction of this case remains solely in the district court.

Absent one of the specific appealable interlocutory orders, which is not involved in this case, a non-final judgment is not appealable unless specifically certified by the district court. *See* 28 U.S.C. §1291; Fed. R. Civ. P. 54(b). No such certification occurred in this case. Thus, finality of the judgment in this case is a jurisdictional prerequisite to any appeal. And, it is elemental law that an appellate court's jurisdiction is fundamental, and may not be waived or even conferred by agreement.

Partial summary judgments are not—and never have been—final, appealable judgments. *Liberty Mut. Ins. Co v. Wetzel*, 424 U.S. 737, 744, 96 S. Ct. 1202, 1206 (1976). Thus, if this Honorable Court questions the finality of the judgment at issue, it *must* on its own motion assess the jurisdiction of the Court of Appeals in this case. *Id.* at 740; at 1204-05. And, if this Honorable Court concludes that the Court of Appeals lacked jurisdiction to hear the appeal below, this Court *must* vacate the judgment of the Court of Appeals with instructions to dismiss Wang's appeal; thereby returning this case to the district court. *Id.*

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[3] The Judgment in this case expressly dismissed all of Wang's claims with prejudice. (Pet. For Cert. 33a).

CONCLUSION

Contrary to Respondent's assertions, neither of Petitioner's Questions Presented, nor any part thereof, has been waived in the district court or at the Court of Appeals level. Therefore, for all the reasons previously enunciated in Wang's Petition for Writ of Certiorari, this Honorable Court should exercise its supervisory power and grant Wang's Petition for Writ of Certiorari.

Alternatively, this Honorable Court should assess the jurisdiction of the Court of Appeals for the Fifth Circuit in this case and, if found lacking, this Honorable Court should vacate the judgment of the Court of Appeals with instructions to dismiss Wang's appeal and return this case to the district court.

Respectfully submitted,

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